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FIRST GENERAL COUNSEL'S REPORT

CELA

PRE-MUR: 527

DATE RECEIVED: October 14, 2011

DATE ACTIVATED: January 3, 2012

EXPIRATION OF SOL:

Earliest: February 2, 2006

Latest: November 19, 2015 (estimates)¹

SOURCE:

Sua Sponte Submission

RESPONDENTS:

United Power, Inc.

RELEVANT STATUTES:

2 U.S.C. § 441b

2 U.S.C. § 441f

INTERNAL REPORTS CHECKED:

Disclosure Reports

¹ This matter involves a corporation's reimbursement of contributions made by members of its board of directors. The statute of limitations dates are estimates based on the earlier of the date a contribution was reported or the date a director claimed reimbursement because the dates each contribution was made or reimbursed are not known. United Power has signed a tolling agreement for the contributions that were still within the statute of limitations as of October 21, 2011, the date the tolling agreement was mailed to United Power following its *sua sponte* submission.

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I. INTRODUCTION

United Power, Inc. ("UP") is an incorporated non-profit Colorado rural electric utility cooperative. It is a member of Colorado Rural Electric Association ("CREA") and National Rural Electric Cooperative Association ("NRECA"), which are state and national trade associations, respectively. UP filed a *sua sponte* submission ("Submission") with the Commission disclosing that it reimbursed a substantial portion of annual contributions made by members of its Board of Directors to the Action Committee for Rural Electrification ("ACRE"), the separate segregated fund of NRECA, and to the Colorado Advocates for Rural Electrification ("CARE"), the state political committee of CREA. The reimbursed contributions, made from 2001 through 2010, totaled \$37,462. Each contribution was divided between ACRE and CARE. The portion of reimbursed contributions attributable to ACRE that is still within the statute of limitations is \$7,956.

According to the submission and supplemental information provided by UP, the reimbursements came to the attention of its new Chief Executive Officer, Richard Ashe, during an examination he requested of UP's internal policies, procedures, and controls upon assuming his position in February 2011. Having learned of the reimbursements, Mr. Ashe contacted the Board's outside counsel to determine their propriety. After counsel determined that state and federal laws had been violated, Mr. Ashe immediately launched an investigation. During the investigation, UP traced the genesis of the reimbursement practice to a 2000 proposal by its former CEO, approved by the Board, to permit UP directors to obtain reimbursement of \$400 of each director's annual \$500 combined contribution to ACRE and CARE by filing an expense claim to be paid out of each director's budgeted annual per-diem and expense account. UP filed

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sua sponte submissions with the Commission and the Colorado Secretary of State, and took a number of remedial actions, discussed below.

Based on the available information, we recommend that the Commission find reason to believe that United Power committed non-knowing and willful violations of 2 U.S.C. §§ 441b and 441f:

As further explained below, we

do not recommend that the Commission take any action as to the former and current UP directors who were reimbursed for their contributions, or as to ACRE and CARE.

II. FACTUAL AND LEGAL ANALYSIS

A. Factnot Summary

1. The Reimbursed Contributions

UP, which distributes electricity to approximately 67,000 members in Colorado, is governed by an 11-member elected Board of Directors. Submission at 3. UP directors receive no salary, but directors are reimbursed for attending meetings and for expenses. UP budgets a yearly per diem and expense account for each director from which it pays the director a per diem for attending Board, committee, and other authorized meetings, and reimburses the directors for expenses they incur in conducting UP-related business. Submission, Exs. 3.3 and 3.7. The per diem and expense account was subject to an annual cap that ranged from \$20,000 to \$25,000 during the relevant period. Submission, Ex. 3.3 at 4; *see id.* at Ex. 6.5.

CARE solicits annual joint "memberships" for CARE and ACRE from certain categories of individuals associated with its cooperative members at various contribution levels. *See* Submission, Ex. 4.4. The highest contribution level, \$500, is designated as the "President's Club," and those who contribute at the level automatically became "members" of both ACRE and CARE. *Id.*

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1 On November 27, 2000, UP's former CEO, Robert Broderick, proposed in a
2 memorandum to the Board an approach designed for UP to become the first cooperative to have
3 100% participation at the "President's Club" level. Submission, Ex. 1.2. In the memorandum,
4 Broderick said he would explain the details at the next Board meeting, but said that his idea
5 involved using unused funds from each director's budgeted per diem/expense account to assist
6 them in "purchasing President's Club membership." *Id.*

7 Broderick described his proposal in another memorandum to the board, dated December
8 19, 2000. Submission, Ex. 1.3. This memorandum says that his plan for achieving 100%
9 participation had been discussed with CREA. Broderick explained that CREA stated that each
10 director must write a personal check for the President's Club contribution amount. Because
11 some of the directors were apparently contributing \$100 jointly to CARE and ACRE, those
12 directors would have to contribute another \$400 to reach the President's Club level. Submission
13 at 4-5. Broderick advised that each director could then claim the \$400 difference as a director's
14 expense, which would be reimbursed. Submission, Ex. 1.3. The following year, at a
15 September 21, 2001, Board meeting, the directors approved a motion that "each Director be
16 allowed to spend \$400 within his or her cap toward the President's Club." Ex. 2.3 at 2.

17 Thereafter, according to UP's submission, its External Affairs Director typically collected
18 \$500 contribution checks from directors for delivery to ACRE and CARE at Board meetings
19 each fall. Submission at 7. During these meetings, directors would typically fill out "Director's
20 Per Diem and Expense Claim Forms" that included the \$400 CARE/ACRE contribution as an
21 expense. *Id.* The directors themselves approved the claims by circulating and initialing the
22 forms during Board meetings. *Id.*; Supplemental Information at 2 (Feb. 23, 2012) ("Supp.

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Info."). Disclosure reports filed by ACRE and CARE show that ACRE received 51% of each \$500 contribution (\$255) and CARE received 49% (\$245).

The per diem and expense claim forms provided by UP show that each UP director claimed reimbursement for \$400 of the \$500 CARE/ACRE contributions, for the most part listing it under a category called "other expenses." See Exs. 5.1-5.15. The directors variously described the expense as "PAC \$400," "CARE/ACRE \$400," "CARE \$400," "ACRE \$400," or "President's Club \$400."² UP treated the contributions as expenses and reimbursed each director. See Submission at 6, Exs. 6-1 to 6-3. The reimbursements were reported as taxable income in each director's IRS Form 1099 from 2004 through 2010.³ Submission at 6. UP's reimbursement practice continued through 2010.

2. UP's Review of the Reimbursements and Corrective Action

As noted above, in February 2011, UP's new executive director Asche requested a review of UP's internal policies, procedures, and controls. Submission at 1; Supp. Info. at 3. Upon learning of the reimbursed contributions, Mr. Asche contacted the Board's outside counsel to determine the propriety of the reimbursements. When counsel determined that the reimbursement practice did not comply with federal law, UP immediately stopped the practice and initiated an investigation conducted by counsel. Submission at 2-3; see Supp. Info. at 3.

Based upon that investigation, UP concludes that the reimbursement practice resulted from a misunderstanding of what expenses could be reimbursed due to poor or misguided communication to the Board by Broderick and a former Chief Financial Officer. Submission at

² In isolated instances, a few directors listed the CARE/ACRE contributions on the claim form under the "per diem" category, but UP treated them as expenses. In the submission, UP provided "Director's Per Diem and Expense Claim Form[s]" from 2004 forward. UP states that prior expense records were destroyed under its record retention policy. Submission at 6. Nonetheless, based on other available records, UP believes it also treated the contribution reimbursement as expenses in 2001 through 2003. *Id.*

³ As with the expense records, UP can document the tax treatment of the reimbursements from only 2004 forward because older records were destroyed under the record retention policy.

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2, 10. According to UP, Broderick apparently believed it was permissible for UP to reimburse \$400 of the \$500 ACRE/CARE contribution from each director's budgeted per diem and expense account. Submission at 5. UP seems to suggest that this understanding may have resulted in part from documents prepared by ACRE. These included an ACRE "Toolkit" providing guidance on fundraising and an ACRE-produced document entitled "Legal Guidelines on Soliciting and Collecting Contributions," which state that directors could contribute to ACRE using their per diem. *Id.* at 6, Ex. 4.2 at 1, Ex. 4.3 at 2. According to UP, two former UP directors interviewed during the internal investigation stated that the intent of the reimbursement practice was to allow directors to deduct from their earned per diem \$400 of the \$500 contribution to ACRE and CARE in a manner similar to UP's payroll deduction system, which is used to collect voluntary contributions from employees to ACRE and CARE. *Id.* at 6. In practice, however, UP's directors claimed virtually all of the contributions as expenses rather than as an offset to their per diems; UP, in turn, treated all of the reimbursements as expenses rather than deducting them from per diems. *Id.* at 7. Thus, the directors were paid their "earned" per diems, and the reimbursements for the contributions were paid separately as reimbursed expenses.

During the internal investigation, CREA's executive director at the time of the relevant events was interviewed. He was unable to provide any information concerning Broderick's December 19, 2000, memorandum to the Board, which had suggested that Broderick vetted the procedure with CREA. Supplemental Information (Apr. 16, 2012) at 3 ("Second Supp. Info"). And CARE has specifically denied that anyone at CREA, CARE, or any of their agents,

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suggested that directors could be reimbursed for contributions to CARE and ACRE from corporate funds. *See infra* Part II.B.3.

UP maintains that its investigation determined that there was no intent to violate federal law. Submission at 2. It emphasizes the transparency of the reimbursement process, including the fact that the directors' expense claim forms listed the purpose of the reimbursements, the apparent approval of the expense forms at Board meetings open to UP's member-customers, and the ability of UP member-customers to obtain all expense records through a written request by stating the purpose of the request. Submission at 4-5. UP also states that counsel who conducted the investigation obtained and reviewed extensive documentation and found no evidence of an intent to violate the law. Submission at 3-4, 5. Finally, UP maintains that since Broderick himself made contributions to the CARE/ACRE "President's Club" through deductions to his pay, a legally-compliant method, it is "incongruous" that he would have established an unlawful method for the directors to make contributions. *Id.* at 5.

Following UP's investigation, counsel advised the Board that the directors should repay UP in full for all of the reimbursed contributions. Submission at 9. UP thus sought repayment of all reimbursements from UP's living directors, including reimbursements made outside the five year statute of limitations.⁵ *Id.* at 9-10.

UP has taken other corrective action as well. UP revised its policies on "Charitable and Political Contributions," "Directors' Per Diem Expenses," and "Employee Business Expense

⁵ All but two of the current and living former directors who had been reimbursed sent checks to UP in the amount of all of the reimbursements they received. *Id.* at 9-10, Exs. 7.1, 7.2. One former director chose to repay only the reimbursements he received within the statute of limitations, and another elderly former director, assertedly "unable to appreciate" the facts and circumstances, declined to repay the single contribution for which he had been reimbursed in 2003. *Id.* at 9-10 & n.26. Mr. Asche paid UP for these two directors' reimbursed contributions using his personal funds. *Id.* at 9 n.26. UP has deposited these repayments, totaling \$33,462, into two segregated bank accounts, one for the reimbursed ACRE contributions and the other for reimbursed CARE contributions. *Id.* at 9-10, Ex. 7.1.

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1 Reimbursement" to state expressly that directors, officers, and employees may not be
2 reimbursed, directly or indirectly, for making political contributions.⁶ *See id.*, Exs. 8.2 at 2; 8.1
3 at 5; 8.3 at 3. In the 60 days preceding its submission, UP also conducted intensive education of
4 its Board members and senior staff concerning federal and state campaign finance laws. *Id.* at
5 10. Finally, UP represents that it will conduct additional education sessions for its directors and
6 employees on campaign finance laws at least once a year, and more frequently as laws change,
7 and it will ensure that new directors receive this education. *Id.*

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B. Analysis

21 The Act prohibits any person from making a contribution in the name of another person
22 and knowingly permitting his or her name to be used to effect such a contribution. 2 U.S.C.
23 § 441f. It also prohibits any person from knowingly accepting a contribution made by one

1 person in the name of another person. *Id.* The Commission's regulations further prohibit
2 knowingly helping or assisting any person in making a contribution in the name of another,
3 including "those who initiate or instigate or have some significant participation in a plan or
4 scheme to make a contribution in the name of another[.]" 11 C.F.R. § 110.4(b)(1)(iii);
5 Explanation and Justification for Affiliated Committees, Transfers, Prohibited Contributions,
6 Annual Contribution Limits, Earmarked Contributions, 54 Fed. Reg. 34,105 (Aug. 17, 1989).
7 The Act also prohibits corporations from making any contributions in connection with a federal
8 election and prohibits corporate officers from consenting to such contributions. 2 U.S.C.
9 § 441b(a).

10 1. UP

11 It is undisputed that UP made corporate contributions in the name of another when it
12 reimbursed \$19,105 in contributions made by its directors from 2001-2010 to ACRE, the
13 separate segregated fund of a national trade association.⁸ Thus, UP violated 2 U.S.C. § 441f.
14 Additionally, UP made the reimbursements to its directors from its corporate treasury funds in
15 violation of 2 U.S.C. § 441b(a). Accordingly, we recommend that the Commission find reason to
16 believe that United Power, Inc. violated 2 U.S.C. §§ 441b and 441f.

17 There is insufficient information, however, to demonstrate that there is a reason to
18 believe that UP's conduct was knowing and willful. See 2 U.S.C. § 437g(a)(5)(B) and 437g(d).
19 The knowing and willful standard requires knowledge that one is violating the law. *FEC v. John*
20 *A. Damesi for Cong. Comm.*, 640 F. Supp. 985, 987 (D.N.J. 1986). A knowing and willful
21 violation may be established "by proof that the defendant acted deliberately and with knowledge
22 that the representation was false." *United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990).

⁸ UP says that the contributions were equally divided between ACRE and CARE, putting the share attributable to ACRE at \$18,731. Submission at 4 n.4, 8. However, disclosure reports filed by ACRE and CARE show the contributions were split 51%-49%, so the portion of the contributions attributable to ACRE is \$19,105.

1 Evidence need not show that the defendant had a specific knowledge of the applicable law; an
2 inference of a knowing and willful act may be drawn from the defendant's scheme to disguise
3 the source of funds used in illegal activities. *Id.* at 213-15.

4 Based on the record evidence recounted above, there is no information available
5 suggesting that UP attempted to conceal or disguise its reimbursements. *Cf.* MUR 6515
6 (Professional Fire Fighters of Wisconsin) (respondent reimbursed its officers for political
7 contributions through fictitious claims for conference registration fees) (open matter);
8 MUR 5628 (AMEC Construction Management) (respondent reimbursed officers and employees
9 for political contributions via "grossed up" bonuses to ensure the net bonus amount equaled the
10 contribution amount).

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IV. RECOMMENDATIONS

1. Open a MUR in Pre-MUR 527 as to United Power, Inc.
2. Find reason to believe that United Power, Inc., violated 2 U.S.C. §§ 441b and 441f.
3. .
4. Approve the attached Factual and Legal Analysis.
5. . . .
6. Approve the appropriate letters.

5/11/12
Date

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BY:


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